SUPREME COURT OF THE UNITED STATES.

No. 265.

MATTHEW BONNER, EXECUTOR OF CADWALLADER WALLACE, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the United States Court of Claims.

To the honorable the judges of the Court of Claims:

Your petitioner, Cadwallader Wallace, a citizen of the State of Ohio, respectfully represents and states: That the State of Virginia, during the war of the Revolution, promised bounty lands to her troops on the continental establishment, and had by law set apart for their satisfaction a district of country within the limits of the present State of Kentucky, upon the waters of the Cumberland river and between the Green river and Tennessee. A doubt having subsequenty arisen whether the district of country thus set apart was large enough to satisfy these bounties, Virginia in her deed of cession to Congress of the territory northwest of the Ohio river, made provision for this contingent deficiency by a reservation in these words, viz: "That in case the quantity of good land on the southeast side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee, which has been reserved by law for the Virginia troops on continental establishment, should, from the North Carolina line bearing in further south upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency shall be made up to said troops in good lands, to be laid off between the rivers Scioto and Little Miami, on the northwest side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia." (1 vol., 472, Duane & Bioren's ed. L. U. S.)

Congress, on the day this deed was executed by the delegates from Virginia, passed an act of acceptance of it. (Same vol., 474.)

Subsequently, in the year 1790, Congress passed an act admitting a deficiency of good lands on the southeasterly side of the Ohio for the satisfaction of those bounties, and authorized locations of them to be made in the reservation between the Scioto and Little Miami rivers.

At the period of the cession of the territory, and for many years afterwards, the country reserved was an uninhabited wilderness, and incapable of being described by specific boundaries. The Scioto and Little Miami were both known to be tributaries to the Ohio river, and the reservation was described as the country between them. The sources of those rivers are from fifty to sixty miles apart, and the boundary line between them was of necessity left open by the parties to the deed of cession for future ascertainment and adjustment, when a more perfect knowledge of the country should be obtained.

In the year A. D. 1802 the Executive of the United States, without inviting the co-operation of Virginia, sent out a surveyor
2 of the name of Ludlow, with "instructions to run a direct line between the sources of those rivers, for the purpose of defining the boundary between the lands of the United States and that part of the military reservation."

He proceeded to that locality, explored the Little Miami river, and after finding what he supposed to be its true, but in fact a short

distance east of what has since been established by judicial decision as its true source, ran from it a direct random line towards what he supposed to be the head water of the Scioto.

On arriving at what was then the Indian boundary, commonly called "The Greenville Treaty line," at a distance of some forty-one or two miles from his starting point, his further progress was arrested by the Indians, who refused to permit him to extend the line through their country.

This random line bore too far to the east, and if extended to the Scioto would strike that river many miles below and east of its source. It was, however, returned by Ludlow to the surveyor general as the exterior line of the military reservation between the head waters of those rivers; and the surveys of the public lands west of it, which were made shortly afterwards, were based upon it. This line is commonly known by the name of "Ludlow's line."

Two years after Ludlow ran this line (in 1804) Congress passed an act declaring that the line run by him, together with its course continued to the Scioto, should be considered and held as the western boundary line of the reservation between the two rivers; provided the State of Virginia should within two years after its passage recognize it as the boundary. (2 vol. Statutes, 274.)

Virginia did not accede to this proposition, and the subject of the boundary remained without further legislative action until the year 1812, when Congress made another essay to bring about its adjustment.

In that year an act was passed which authorized the President of the United States to appoint three commissioners on the part of the general government, to act with such commissioners as might be appointed by the State of Virginia, the commissioners to have full power and authority to ascertain, survey, and mark the boundary between the Little Miami and Scioto rivers, according to the true intent and meaning of the deed of cession. The act contained a provision that, until the western boundary of the reservation should be established by the agreement and consent of the United States and the State of Virginia, the line (Ludlow's) designated by the abovementioned act of 1804, should be considered and held as the proper boundary. (2 Statutes, 764.)

In case the United States commissioners were not met by those of Virginia, or in case of disagreement between the two boards, the commissioners of the general government were directed to run and mark the boundary according to the true intent and meaning of the deed of cession, noting the intersections of former surveys, and make their report to the Commissioner of the General Land Office, to be laid before Congress at its next session.

3 Virginia appointed commissioners to act for her, and some time during the autumn of that year the commissioners of the two governments met to discharge this duty.

They jointly explored the waters of the two rivers, and agreed and fixed upon their head or highest sources. A surveyor of the name of

Roberts was then directed by them to run a direct line between the points agreed upon as their sources.

He ran the line accordingly, and this line is known by the name of Roberts's line. While the line was being run, or on its completion, the Virginia commissioners advanced the claim that the boundary of the reservation, according to the true meaning of the deed of cession, was a direct line from the head source of the Scioto to the Ohio river, at the mouth of the Little Miami, instead of to its source.

On this the commissioners disagreed, and separated without an adjustment of the boundary. Each commission made its separate report to its own government. That of the United States reported that Roberts's was the true line of boundary between the two rivers, and that they had insisted on its recognition as such. Roberts's line is west of Ludlow's; both commence near the same point in the source of the Little Miami, and diverge from each other until they strike the Scioto, forming between them a triangular gore of country.

The subject of this boundary remained on the footing above described until the year A. D. 1818, when Congress passed an act, which declared that Ludlow's line, from the source of the Little Miami to the Greenville Treaty line, should be considered and held to be the boundary until otherwise directed by law; and that Roberts's lines from the Greenville Treaty line to the source of the Scioto, should be the permanent boundary. (Act of 11th of April, 1818, 3d vol. Statutes, 423.)

Ludlow's and Roberts's lines south of the Greenville Treaty line embrace a district of excellent lands; some of them had been sold at the Cincinnati land office prior to the time when Roberts's line was run, although, in point of fact, these lands were not within the limits of that land district, and were sold without authority of law. By the proceedings under the above-mentioned act of 1812, it was ascertained with certainty that the military reservation extended as far west as Roberts's line; but it was not then established as the legal and permanent boundary, because the Virginia commissioners claimed a line still further west. The sale of these lands, however, was still continued at the Cincinnati land office, and the proceeds were paid into the treasury of the United States.

These legislative essays to effect a settlement of this boundary having failed in the manner above set forth, resort was next had to the judiciary. A suit was brought by a claimant of an entry made on a military warrant between these two lines, south of the Greenville Treaty line, against a purchaser of the same land at the Cincinnati land office, for the purpose of settling the question of boundary. The suit was defended by the United States. It resulted in a decision by the Supreme Court of the United States establishing
4 Roberts's line as the true boundary. (See Doddridge, lessee, *vs.* Thompson & Wright, 9th Wheat., 477.) This decision was made in the year 1824, and in 1829 it was reviewed and reaffirmed by the same court. (See Reynolds *vs.* McArthur, 2 Pet., 417.)

The sale of these lands, however, still continued at the Cincinnati land office as before.

In the mean time all the good land in the reservation east of Ludlow's line was taken up and exhausted by the holders of military warrants.

In this state of things, your petitioner, Cadwallader Wallace, being the owner and in possession of forty-one thousand one hundred and forty-two $\frac{5}{6}$ acres (41,142$\frac{5}{6}$) of unsatisfied military bounty land warrants, for services of the troops of Virginia on continental establishment, and there being no good land within the limits of said reservation east of Ludlow's line, south of the Greenville treaty line, nor east of Roberts's line north of said treaty line, by the entry of which said warrants could be satisfied, did, on or about the day of , A. D. 1838, enter said warrants on good lands within the limits of said reservation, and in that part of it which lies between Ludlow's and Roberts's line, and south of the Greenville Treaty line, and proceeded immediately thereafter to survey out said entries in conformity to the laws and usages of Virginia. On the completion of said surveys, in the year last above named, he, without delay, requested the Executive of the United States to issue patents upon the same, which then were and have ever since been refused. Of the lands thus entered and surveyed by your petitioner, thirty-seven thousand six hundred and twenty-two acres had been sold at the Cincinnati land office, at various periods of time prior to said entries thereof by your petitioner, and the net proceeds of the sale of said 37,622 acres, amounting to seventy-five thousand five hundred and fifty-one dollars and fifty-six cents, paid into the treasury of the United States; and the residue of the land thus entered, amounting to three thousand five hundred and twenty acres, had been disposed of by the United States for schools, and in other donations, which, if sold at the average rate of the 37,622 acres, would have produced the further sum of $7,068 77-100.

Your petitioner claims and insists, that by the means and in the manner above stated, the general government has sold and appropriated to its own use property which it held in trust for the satisfaction of said military bounties, and not for sale or other disposition thereof; and which, if said trust had not been thus violated, your petitioner would have had a clear right, as the first locator thereof, to appropriate to the satisfaction of his said military warrants. And your petitioner further claims and insists, that the United States are bound in equity and good conscience to render to him such relief in the premises as, under the circumstances of his case, is just and right. He does not ask that his title to said land may be confirmed and carried into grant, as that would work a hardship on those now in possession of this trust fund; but he does ask and claim that the value of said lands estimated as in a state of nature, or the money received from the sale of them, with interest thereon from the close of that session of Congress when he first presented his petition for relief, may be awarded to him; or that land script for the amount of the money received, and interest from the close of said session may be issued to him, receivable as cash in the purchase of public lands; your petitioner, in either case, to assign and transfer

to the United States his said warrants and the entries made thereon. Your petitioner will be satisfied with any of the above modes of compensation, or with such other mode, if any there be, as will be equitable and just. Your petitioner is the sole owner of said military warrants, and no other person has any interest in them; and they have cost your petitioner in cash, counting simple interest upon the money invested in their purchase, not less than seventy-five thousand dollars.

Your petitioner further states, in conclusion, that he presented his claim to Congress as early as the 2d session of the 25th Congress, when it was left at the close of the session without action upon it.

It was presented again at the next session, (1st sess. 26th Cong.,) when the Committee on Public Lands, H. R., on the 25th of May, 1840, made a report, No. 509, in favor of the claim, with a bill, No. 408, for payment of $103,332 $\frac{50}{100}$ to your petitioner, which was not acted upon in that Congress.

In the first sess. of the 29th Cong. the claim was referred to the Committee on Public Lands in the Senate, and a report, No. 485, with a like bill, No. 491, was made in favor of petitioner. Not acted upon by that Congress.

In the 2d sess. of the 29th Cong. the claim was again referred to the Committee on Public Lands in the Senate, and a report, No. 20, with a like bill, No. 54, was made in his favor. Not acted upon by that Congress.

In the 1st sess. of the 30th Cong. the claim was again referred to the Committee on Public Lands in the Senate, and a report, No. 10, with a like bill, No. 44, in favor of the claim. At the 2d sess. of that Congress this bill was taken up and passed the Senate—a report was made against the bill by a majority of the Committee on Public Lands in the House, and a minority report in favor of it, and no further action had upon it in that Congress.

At the 1st sess. of the 32d Cong. the claim was referred to the Committee on Public Lands in the Senate, and a report, No. 205, with a bill, No. 401, was made in its favor. No action had on the bill.

In the 2d sess. of the 27th Cong. the claim was referred to the Committee on Public Lands in the House, and an adverse report, No. 189, made by that committee.

In the 3d sess. of the same Cong. the same committee made adverse report, No. 175.

In the 1st sess. of the 33d Cong. the claim was referred to the Committee on Public Lands in the Senate, and an adverse report, No. 194, made by that committee.

6 The foregoing is believed to be a statement of all the reports, pro and con, on the subject of this claim.

CADWALLADER WALLACE.

S. F. VINTON,
For Petitioner.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

JUNE 29*th*, *A. D.* 1855.

Then personally appeared Cadwallader Wallace (who signed the foregoing petition) before me, the subscriber, an acting justice of the peace within and for the city and county aforesaid, who, being duly sworn, did on oath declare, that the facts stated in said petition are true, to the best of his knowledge and belief.

J. L. SMITH, *J. P.*

6 At a Court of Claims, held at the Capitol, in the city of Washington, on Saturday, the 12th day of December, A. D. 1863.

CADWALLADER WALLACE
vs.
THE UNITED STATES.

Joseph J. Coombs, esq'r, having suggested to the court that Cadwallader Wallace has died testate, devising and bequeathing his whole estate to Mathew Bonner, and appointing said Bonner his sole executor, this day moved the court to substitute the name of said Bonner as executor, devisee, and legatee aforesaid, for that of said Wallace, upon the filing in this cause of a certified copy of the letters testamentary, and to continue the cause, with leave to take further testimony.

The motion was allowed.

7 [Copy.]

In the United States Court of Claims.

MATTHEW BONNER, EXECUTOR OF THE WILL OF
Cadwallader Wallace, dec.,
vs.
THE UNITED STATES.

The said Matthew Bonner, by leave of the court, now comes and amends the petition filed herein by his testator, and avers that he has at all times borne true allegiance to the government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government; and further that the said Cadwallader Wallace, his testator, so long as he lived, at all times bore true allegiance to the said government of the United States, and never in any way voluntarily aided, abetted, or gave encouragement to rebellion against said government.

MATTHEW BONNER.

STATE OF OHIO, *County, ss:*

On this day of , 1864, before the subscriber, a &c., personally came the above-named Matthew Bonner, and made oath to the truth of the several allegations contained in the foregoing amendment to petition in the Court of Claims.

8 In the United States Court of Claims.—To the October term, A. D. 1864.

MATHEW BONNER, EXECUTOR OF CADWALLADER Wallace, deceased,
vs.
THE UNITED STATES. } No. 25.

And the said defendants come and make answer to the said original and amended petitions on file herein, and for answer say that they are not indebted to the said claimant in the sum of eighty-two thousand six hundred and twenty dollars and thirty-three cents, or any part thereof. And further answering, said defendants most expressly deny each and every allegation of said claimant's petition, and call for strict proof of each and all the allegations therein contained.

Wherefore the defendants pray judgment.

JOHN J. WARD,
Assistant Sol'r for Def'ts

And for a further plea in this behalf, the defendants, by leave, say that the said plaintiff ought not to have or maintain his aforesaid action against the said defendants, because they say that the plaintiff sets forth in his petition no claim against the United States, whereof this court or any other court hath jurisdiction, and this the said defendants pray may be inquired of by the court. &c.

JOHN J. WARD,
Assistant Solicitor for Def'ts.

9 And for a further plea in this behalf, the defendants, by leave, say that the said plaintiff ought not to have or maintain his aforesaid action or claim against the said defendant, because it says that the several supposed causes of action in the said petition mentioned, (if any such there were or still are,) answered to the said plaintiff more than six years next before the filing of the petition herein, and more than six years before the passage of the act entitled an act to amend An act to establish a court for the investigation of claims against the United States, approved February 24th, 1855; and which amendatory act was approved March 3d, 1863.

And this the defendants are ready to verify Wherefore they pray judgment, &c.

JOHN J. WARD,
Assistant Solicitor for Def't.

10 Court of Claims.

MATHEW BONNER, EXECUTOR OF THE LAST WILL of Cadwallader Wallace, and devisee and legatee in trust thereunder,
vs.
THE UNITED STATES.

And the said petitioner, for a replication to the plea by the defendant secondly above pleaded, says that the petition does not set

forth a claim against the defendant, of which this court hath jurisdiction.

By THURMAN & COOMBS,
His Att'ys.

The said Mathew Bonner, being sworn, saith that the statements of the foregoing replication are true, as he verily believes.

MATHEW BONNER.

Subscribed and sworn before me this 13th day of December, 1864.

JAMES C. WELLING,
Assist. Cl'k Ct. of Claims.

And as to the plea of the defendant thirdly above pleaded, saith that said plea and the matters thereof are insufficient in law to have his action. Wherefore he doth demur to said plea.

By THURMAN & COOMBS,
His Att'ys.

11 In the Court of Claims.

CADWALLADER WALLACE
vs.
THE UNITED STATES.

On demurrer to plea of stat. lim. by solicitor of U. S.

Per curiam:

Whether the 10th section of the act of 3 March, 1863, limiting the time in which claims against the United States, cognizable by this court, shall be barred, should, in any case, receive a construction which would give it a retroactive effect, we need not now decide. It is sufficient for the decision of the question raised by this demurrer to say, that, in our opinion, the limitation of that section does not operate on a claim which was depending in this court before and at the date of the passage of the act of 3 March, 1863.

We, therefore, sustain the demurrer.

Endorsed: No. 25. Cadwallader Wallace *vs.* The United States. Decision on demurrer to plea of stat. lim. By Casey, Ch. Jus., sustaining demurrer. Filed Dec. 14, 1864.

12 In the Court of Claims.

MATHEW BONNER, ADM'R OF CAWALLADER Wallace, des'd,
vs.
THE UNITED STATES.

And now, to wit, 30th of January, 1865, the court, upon due consideration of the premises, do order, adjudge, and decree that the said claimant take nothing by his suit, and that the said petition be dismissed.

By the court.

13 In the U. S. Court of Claims.

MATTHEW BONNER, EXECUTOR OF THE LAST will of Cadwallader Wallace, deceased,
vs.
THE UNITED STATES.

To the Court of Claims:

Your petitioner, claimant in the above-entitled cause, prays the allowance of an appeal to the Supreme Court of the United States from the judgment of this court in this cause; and that this court will certify to the said Supreme Court the following facts, found by this court, from the evidence, together with the rulings and judgment of this court thereon, to wit:

1st. That in December, 1838, and January, 1839, petitioner's testator, the said Cadwallader Wallace, being the owner and holder of unsatisfied military bounty-land warrants for 41,082⅚ acres, issued by the State of Virginia for the services of her troops on continental establishment in the war of the Revolution, located the same by two entries, numbered 14,147 and 14,169, on lands claimed to be within the district reserved by Virginia, between the rivers Scioto and Little Miami, for the satisfaction of warrants of that class, in her deed of cession to the United States of March 1, 1784; and which lands, so located by the said Wallace, all lie south of the Greenville treaty line, and between the lines known as Ludlow's and Roberts's lines; that in January, 1839, the said Cadwallader Wallace caused the said lands, so entered, to be surveyed according to the laws and usages of Virginia, and on the 15th day of said month the surveys thereof were examined by the surveyor of the Virginia military district within the State of Ohio, and duly recorded in his office; that immediately thereafter the said Wallace filed the said warrants, with duly authenticated copies of said entries and surveys, in the General Land Office of the United States, and applied to the Executive of the United States for the issue of patents thereon; but the same were then, and ever since have been, refused.

2d. That said entries, surveys and returns were such as would have entitled the said Wallace to patents thereon from the United States, if said entries had been made on vacant lands in said Virginia military district, east of the said Ludlow's line.

3d. That some years previous to the location of said warrants by the said Wallace, all the good lands, or lands of any real value, in the said Virginia military district, east of Ludlow's line, had been entered and appropriated in satisfaction of the class of bounty-land warrants for which they had been reserved, except an inconsiderable quantity in small tracts, much scattered among the broken and sterile lands which prevail in the south-eastern portion of said dis-
14 trict; and at the time of said locations there were not good lands, vacant or unappropriated, in said district, sufficient to satisfy the said warrants, or any considerable proportion thereof, except between the said Ludlow's and Roberts's lines, and south of the Greenville treaty line.

4th. That of the lands entered and surveyed by the said Wallace as aforesaid, 37,622 acres had been sold at the Cincinnati land office at various periods prior to said entries, and the net proceeds of the sales thereof, amounting to $75,251, 56, had been paid into the treasury of the United States; and the residue of the said lands had been donated by the United States for schools and other purposes.

5th. The said Roberts's line is a straight line between the sources of the two rivers, the Scioto and the Little Miami, and is therefore the true western boundary of the district of land lying between said rivers, according to the deed of cession aforesaid.

On this state of facts the petitioner claimed that said warrants were all located upon lands within the district reserved by Virginia in her said deed of cession to the United States for the satisfaction of warrants of that class; that, by virtue of said deed of cession, the United States took the lands embraced in said reservation, subject to two trusts, viz: 1st. To appropriate the said lands in satisfaction of the bounty claims for which they were reserved; and, 2d. To hold the surplus, if any, after satisfying all of said bounty claims, "as a common fund for the use and benefit of the several States of the confederacy." That the United States having wrongfully appropriated the lands on which Wallace's warrants were located as aforesaid to the secondary trust, before the primary trust was satisfied, are bound in justice and equity to make compensation to his estate by paying over at least the amount of money actually received into the treasury for the sale of said lands, with interest thereon.

But the court ruled, 1st. That Ludlow's line was rightfully established as the western boundary of the reservation in the deed of cession from Virginia to the United States, of March 1, 1784, by the acts of Congress of June 26, 1812, and April 11, 1818; and that, therefore, the claimant's warrants were not located within the boundaries of said reservation.

2d. That the proviso in the act of May 20, 1826, and in the acts subsequent thereto, giving an extension of time within which military warrants might be located, was a condition upon which alone the claimant could be allowed the benefits of such extension of time for the location and return of surveys upon his warrants.

And thereupon the court rendered a judgment for the United States adverse to the prayer of the petitioner.

All which rulings and judgment of this court the petitioner alleges are erroneous and contrary to law.

J. J. COOMBS,
Solicitor for Petitioner.

In the Court of Claims, June 21st, 1866.

MATHEW BONNER, EXECUTOR OF CADWALLADER WALLACE, deceased,
vs.
THE UNITED STATES.

Ordered, That the appeal in the above named case be allowed and certified as prayed for in claimant's petition, as filed in court on the third day of March, 1865.

By the court.

16 In the Court of Claims.

MATHEW BONNER, EXECUTOR OF CADWALLADER WALLACE, dec's'd,
vs.
THE UNITED STATES.

I, Sam'l H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing is a true transcript of the pleadings in the above-entitled case, and of the judgment of the court thereon, with the petition of the claimant for the allowance of an appeal, as certified by the court, filed within ninety days after the rendition of judgment in said case, and of the order of the court allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 5th day of July, A. D. 1866.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

Attest:

JAS. CASEY,
Ch. J. Ct. of Cl.

Supreme Court of the United States.

MATTHEW BONNER,

EXECUTOR OF THE LAST WILL OF CADWALLADER WALLACE,

Appellant,

VS.

THE UNITED STATES,

Appellee.

POINTS AND BRIEF FOR APPELLANT.

J. J. COOMBS,

Counsel for Appellant.

J. L. Pearson, Printer, corner 9th and D streets.

Supreme Court of the United States.

MATTHEW BONNER,

EXECUTOR OF THE LAST WILL OF CADWALLADER WALLACE,
Appellant,

vs.

THE UNITED STATES,
Appellee.

APPELLANT'S POINTS.

I.

Cadwallader Wallace, in December, 1838, and January, 1839, located and surveyed Virginia Military Continental Land Warrants for 41,082$\frac{5}{6}$ acres between Ludlow and Roberts' lines, and South of the Greenville Treaty Line, in Ohio.

See Printed Record, pp. 8, 9, 21 and 22.

The land thus located lies within the limits of the Virginia Military Reservation.

See Deed of Cession from Virginia, March 1, 1784.
U. S. Land Laws, &c., Part 1, Appendix, pp. 585, 587.
Act of Congress, March 23, 1804, Chap. 33, Sec. 1. 2 Stat. at Large, 274.
Act of Congress, June 26, 1812, Chap. 109, Sec. 1. 2 Stat. at Large, 764.
Act of Congress, April 11, 1818, Chap. 49, Sec. 3. 3 Stat. at Large, 423, 424.

Doddridge *v.* Thompson et al., 9 Wheat., 469. Decided in 1824.

Act of Congress, May 26, 1824, Chap. 188. 4 Stat. at Large, 70.

Reynolds *v.* McArthur, 2 Peters, 417. Decided in 1829.

Act of Congress, May 26, 1830, Chap. 105. 4 Stat. at Large, 405.

Act of Congress, February 12, 1831, Chap. 19. 4 Stat. at Large, 440.

Commissioner Whitcomb's letter. Printed Record, 54.

Matthew Bonner's deposition. Printed Record, 43.

E. P. Kendrick's deposition. Printed Record, 39.

III.

Were it not for certain acts of Congress prohibiting the issuing of patents on military entries made between Ludlow and Roberts' lines, a patent would have been issued to Wallace for the land entered by him as aforesaid.

See Deposition of Samuel V. Niles. Printed Record, 12 to 18 inclusive.

Deposition of Daniel McCarty. Printed Record, 23 to 31 inclusive.

Commissioner Whitcomb's letter. Printed Record, 54, 55.

IV.

These lands were sold by the United States as public lands, and prior to March 12, 1840, there had been paid into the Treasury for them, $75,551.56.

See Commissioner Whitcomb's letter. Printed Record, 54 to 57 inclusive.

V.

When Wallace made said entries there was not remaining unlocated, within the limits of said Military Reservation, *good lands* on which his warrants could have been laid, except between said lines of Ludlow and Roberts and South of the Greenville Treaty Line.

See Depositions of Kendrick, Bonner, and Latham, in Printed Record, 37 to 52.

Act of Congress, May 30, 1830, Chap. 215, Sec. 7. 4 Stat. at Large, 422, 424.

Act of Congress, July 13, 1832, Chap. 205, Sec. 2. 4 Stat. at Large, 578.

Act of Congress, March 2, 1833, Chap. 94. 4 Stat. at Large, 665.

Act of Congress, March 3, 1835, Chap. 30, Sec. 2. 4 Stat. at Large, 770.

VI.

The holders of warrants were entitled to *good lands*.

See Reservation in Virginia Deed of Cession, *supra*.

VII.

The power of Congress to abridge the limits of the Reservation, rested wholly on the assumption that the good lands within the Reservation were more than sufficient to satisfy the military bounties. Even upon this assumption, the power was a doubtful one. But that, if it existed, it rested upon that assumption *alone*, is shown by the reason of the case, and by express adjudication. And that it was at first asserted upon this idea is apparent from the legislation of Congress. That it was attempted to be exercised after the assumption was known to be untrue, only proves an oversight in legislation, or a mistaken view of the powers of Congress.

See Jackson *v.* Clark, 1 Peters, 634, 635;

Doddridge *v.* Thompson, et al., 9 Wheat., and acts of Congress therein mentioned;

Reynolds *v.* McArthur, 2 Peters, 425, 6, 7, 9, 430, 1, 4, 5, 6, and acts of Congress therein mentioned.

VIII.

But it being ascertained that the *good* lands within the Reservation were insufficient to satisfy the military bounties, (indeed *all* the lands within it were insufficient,) Congress no longer possessed the right, if it ever existed, to prohibit locations on military warrants on any part of it. This fact was ascertained as early as 1830, and repeatedly recognized by Congress after that and before Wallace made his entries. See Scrip Laws, *supra.*

It follows, that Wallace's entries are valid, notwithstanding the prohibition to locate west of Ludlow's line.

IX.

But Congress had the power, whether lawfully exercised or not, to prevent the issuing of patents. It could stay the hands of the officers of Government, and prevent them from issuing grants. And it has done so. Wallace has not been able to obtain a patent owing to this prohibitory action of Congress. The Government has sold the land to other persons and pocketed the money. Wallace, for want of a patent, has been prevented from turning these purchasers out of possession, until their title has, in some if not all cases, become perfect by force of the statute of limitations. Wallace has thus lost his land by the action of the Government, and it is but plain justice that the Government should pay him, at least, the price that it received for it, with interest.

X.

But if Congress had the bare legal power to prohibit locations between Roberts' and Ludlow's lines, after it became apparent that the good lands in the Reservation were insufficient to satisfy the military bounties, it had no equitable, or moral, right to do so—much less to sell those lands and take the proceeds to itself. And having done so, good faith and the plainest principles of equity, require it to compensate Wallace.

XI.

Virginia was bound by the acts of her Assembly, passed during the Revolution and before the deed of cession, to grant to her officers and soldiers certain military bounties in her lands west of the Alleghanies. She, afterward, without consideration, granted all these lands to the United States. Equity requires that the latter should not take the benefit of the gift, without satisfying the bounties.

BRIEF FOR APPELLANT.

The history of the claim, and the leading facts upon which it is founded, are fully set forth in the petition. They may be briefly recapitulated as follows:

In December, 1838, and January, 1839, Cadwallader Wallace, being the holder and owner of military land warrants for 41,082½ acres, issued by the State of Virginia to her troops on Continental establishment in the war of the Revolution, located the same on lands claimed to be within the district reserved by Virginia for the satisfaction of warrants of that class, in her deed of cession of March 1, 1784. These lands were situated south of the Greenville treaty line, and between Ludlow's and Roberts' lines; both of which last-mentioned lines have, at different times, been regarded as the western boundary of said reservation. Before the entries made by Wallace, the lands between said lines had been surveyed and sold as public lands by the land officers of the United States, but without authority of law; and at the time of his said entries there were no other good lands within said reservation upon which said warrants could have been located. Wallace completed his entries and surveys, and took all the preliminary steps necessary to entitle him to a patent; but the same was withheld from him by the Government on the ground that certain acts of Congress prohibited the granting of patents on locations made between said lines. It is now claimed that the Government of the United States having sold the lands which it held in trust for the satisfaction of said warrants, and put the money in its Treasury, and refused to complete the legal title of Wallace thereto, is bound to make compensation therefor, at least to the amount of the purchase money received, with interest thereon from the date of his locations.

EVIDENCE.

A condensed statement of the evidence, with reference to the pages of the record upon which it is printed, will be found in the foregoing statement of Appellant's Points.

HISTORY OF THE LUDLOW AND ROBERTS LINES.

The State of Virginia, by her deed of cession, having conditionally reserved all the territory between the rivers Scioto and Little Miami for the satisfaction of the bounties promised her continental troops, it became necessary to ascertain the sources of said rivers, and to establish a boundary line from one to the other.

In the year 1802, Ludlow, who was a United States Surveyor, was instructed by the Executive of the United States to run a direct line between the sources of said rivers. He explored the Little Miami, and found what he supposed to be its true source, from which point he proceeded to run a direct line, at random, towards what he supposed to be the source of the Scioto. On arriving at the then Indian boundary, known as the "Greenville treaty line," some forty-two miles from his starting point, his further progress was arrested by the Indians. This random line bore too far east, and, if extended to the Scioto, would strike that river many miles below and east of its source. This is the line known as "Ludlow's line."

In 1804, Congress passed an act declaring that the line so run by Ludlow, with its course continued to the Scioto, should be considered and held as the western boundary of the reservation, *provided* the State of Virginia should, within two years, recognize it as the boundary. Virginia, however, did not accede to this proposition, and so the act became a nullity.

In the year 1812, an act was passed by Congress which authorized the President of the United States to appoint three Commissioners to act with such Commissioners as

might be appointed by the State of Virginia, to ascertain, survey, and mark the boundary line between the Little Miami and Scioto rivers, according to the true intent and meaning of the deed of cession. This act provided that, until the western boundary of the reservation should be established by the agreement and consent of the United States and the State of Virginia, Ludlow's line should be considered the boundary. It also directed that in case the Commissioners of the United States were not met by those of Virginia, or in case of a disagreement between the two Commissions, the Commissioners of the United States should run and mark the boundary and make their report to the Commissioner of the General Land Office.

Virginia appointed Commissioners, and during the Autumn of that year the two Commissions met to perform the duty assigned them. They jointly explored the waters of the two rivers, and agreed upon the points which constituted their sources. A surveyor of the name of Roberts was employed by them to run and mark a direct line from one of these points to the other, which he did; and this is the line known as "Roberts' line."

About the time that this line was run, the Virginia Commissioners advanced the claim that the boundary, according to the true meaning of the deed of cession, was a direct line from the source of the Scioto to the *mouth* of the little Miami, instead of its *source*. On this the Commissioners disagreed, and each Commission made its separate report to its own government. The United States Commissioners reported that Roberts' line was the true boundary, and that they had insisted on its recognition as such. Roberts' line is west of Ludlow's. Both commence near the same point on the head waters of the Little Miami, but they diverge from each other as they approach the Scioto, including between them a triangular gore of land.

As will be hereinafter shown, Roberts' line has been

twice adjudged by the Supreme Court of the United States to be the true boundary; first in *Doddridge* vs. *Thompson*, (9 Wheat., 477,) and afterwards in *Reynolds* vs. *McArthur*, (2 Pet., 417.)

ARGUMENT AND AUTHORITIES UPON THE LAW.

Virginia, during the war of the Revolution, and prior to her deed of cession to Congress of the territory beyond the river Ohio, promised bounty lands to her troops on Continental establishment, and had set apart for that purpose a district of country within the limits of the present State of Kentucky, on the waters of the Cumberland river, and between the Green river and Tennessee. A doubt having arisen whether the district of country first set apart was large enough to satisfy the bounties, she insisted upon making provision in her deed of cession for such deficiency, if any, as might be found to exist. Accordingly, the country between the Scioto and Little Miami rivers, in the present State of Ohio, was reserved for that purpose. The deed of cession makes the reservation in these words:

"That in case the quantity of good land on the southeast side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee, which has been reserved by law for the Virginia troops on Continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency shall be made up to said troops *in good lands*, to be laid off between the rivers Scioto and Little Miami, on the northwest side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia."

The residue of the territory beyond the river Ohio was ceded to Congress in trust as a common fund for the use and benefit of the several States of the Confederacy, "to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever."

By the adoption of the Constitution of the United States, the trust for the several States was extinguished, or rather the interest therein was transferred to the Government of the United States.

Congress, therefore, by virtue of the deed of cession, became a trustee for the bounty-land claimants, and also for the United States. These trusts were in some measure contingent upon facts to be subsequently ascertained.

If it should turn out that there was good land enough on the waters of the Cumberland to satisfy all the bounties, the whole reservation between the Scioto and Little Miami rivers would belong to the United States.

If there was not enough good land on the waters of the Cumberland, but the deficiency was less in quantity than the good lands between the Scioto and Little Miami, then the surplus only would belong to the United States.

But if the deficiency was equal to, or in excess of, the whole quantity of good land in the reservation, then the entire territory reserved would belong to the bounty-land claimants, and the United States would have no beneficial interest therein, and no part of it could be diverted from said bounty-land claimants without a breach of trust.

On the 17th of July, 1788, Congress passed a resolution prohibiting locations of Virginia military warrants within the Ohio reservation, until a deficiency on the southeast side of the river should be ascertained to exist.

On the 10th of August, 1790, Congress passed an act admitting the existence of such deficiency, and authorizing the location of as much land in the reservation as would make good the deficiency. (Laws U. S., Chap. 40.) It appears from the language of this act that it was then believed the deficiency would absorb a part only of the reservation. Acting upon that supposition, Congress by acts of 3d March, 1803, (chap. 21,) and 23d of March, 1804, (chap. 33,) made provision for disposing of the surplus that would remain after the bounty-land warrants had been satisfied.

Various acts were subsequently passed extending the time for making locations on military warrants, but all apparently proceeding upon the same idea, until the act of 30th May, 1830, (chap. 215.) By the 7th section of that act authority was given to convert these warrants, to the amount of fifty thousand acres, into certificates of land scrip, which were made receivable at any of the United States land offices in payment of lands subject to entry at private sale. This was done because it was then known that the good lands in the reservation had been exhausted. It was a voluntary gratuity, to put the holders of warrants remaining unsatisfied upon something like an equal footing with those who had been fortunate enough to secure locations on good lands within the military district. This was done, no doubt, upon the equitable consideration that it must have been the intention of the parties to the deed of cession to make provision for all the military rights. It is, therefore, a very strong and conclusive admission that the reservation did not contain good land enough to supply the deficiency. Subsequent acts were passed making provisions for converting larger amounts of said military warrants into scrip; and finally the act of August 31, 1852, provided for converting all outstanding warrants into scrip, receivable in payment for public lands subject to entry at private sale. These acts provide, not only for warrants issued to Virginia troops on Continental establishment, but for those issued for service in the Virginia State line and State navy, for which no reservation was made in the deed of cession. This accounts for the large amounts of scrip that have been issued in pursuance of these acts.

This brief review shows that from 1784 to 1790 Congress legislated on the assumption that a deficiency of good lands on the waters of the Cumberland had not been established. From 1790 to 1830, on the assumption that a deficiency did exist, but not large enough to absorb all the good lands in the reservation. Since 1830 it has pro-

ceeded on the admission of the well known fact that the good lands in the reservation were not equal to the deficiency.

It is important to observe that all the decisions of the Supreme Court of the United States, in which they have expressed opinions concerning the powers and duties of Congress in respect to the reservation, were made during the period when it was believed, and when Congress was legislating upon the supposition, that there would be a surplus after satisfying the military bounties. It is hardly necessary to remark, that all the reasoning of the Court based on the assumed existence of this fact must yield to the different state of facts which has since been established.

It is perfectly apparent that in the case of *Jackson* vs. *Clark*, (1 Pet., 634,) the reasoning of the Court was based upon the assumption that there would be a surplus in the reservation. Hence the Court say: "This is not a reservation of the whole tract of country between the rivers Scioto and Little Miami. It is a reservation of *only so much of it as may be necessary to make up the deficiency* of good lands in the country set apart for the officers and soldiers of the Virginia line on Continental establishment, on the southeast side of the Ohio." But this very language concedes, that *if said deficiency should be equal to the whole of the good lands in the reservation*, it would follow that all the lands between the Scioto and Little Miami rivers were reserved.

The Court say in this case, that "the Government of the United States received this territory in trust, not only for the Virginia troops on Continental establishment, but also for the use and benefit of the members of the Confederation;" and that "the military rights constituted the *primary claim* on the trust." It follows, as a matter of course, that if the lands reserved proved insufficient to satisfy the primary trust, the secondary trust became nugatory.

It has since been decided by the same Court, in *Dodd-*

ridge vs. *Thompson*, (9 Wheat., 469,) and again in *Reynolds* vs. *McArthur*, (2 Pet., 417,) that the primary trust attached to the *whole* territory reserved by the deed of cession.

It was adjudged in both of the cases last cited, that Roberts' line is the true western boundary of the reservation, and that the territory between Ludlow's and Roberts' lines, where petitioner's entries were made, is all embraced in the reservation. It was also adjudged, in both of said cases, that no act of Congress ever authorized the sale of the lands between said lines, as public lands; and, consequently, that the sale thereof by the land officers of the United States was without authority of law, and void. No act of Congress authorizing the sale of those lands has since been passed.

It is now an established fact, that the primary claim exceeds the whole quantity of good land in the reservation. It is also proved in this case, that at the time of the location of the petitioner's warrants there were no good lands east of Ludlow's line on which they could have been located. It is an admitted fact, also, that the United States has, through the anauthorized acts of its land officers, appropriated a part of the good lands in the reservation (being the same on which the petitioner's locations were made) to the use and benefit of the secondary claim; that is to say, the United States Government thus sold the land, and put the money into its Treasury.

This makes a simple case of a trustee holding funds subject to a primary and secondary use, who appropriates said trust funds to the secondary claim, before the primary claims are satisfied. In such a case, if the primary claimants should bring the trustee into a court of equity, and demand that he should restore the funds so wrongfully paid over to the secondary claimant, could he successfully resist the demand? If the secondary claimant was a third person, it would be a palliation of the conduct of the trustee that he had paid over the money in good faith, under a mistake as to the legal rights of the par-

ties, and in such case it might be a hardship upon him to be compelled to pay it again. But when the trustee is himself the secondary claimant, (as in this case,) and has merely appropriated the money by putting it into his own coffers, no such hardship can exist.

The only colorable defence that can be made to this claim is, that at the time Wallace made his locations an act of Congress was in force, of July 7, 1838, (5 Stat., 262,) which provided that no military locations should be made on lands lying upon the west side af Ludlow's line, and declared that all patents which might be obtained for lands so located should be held and considered as null and void.

It is not necessary to deny the *power* of Congress to pass this act; nor to deny that the Executive and Judicial Departments of the Government are bound to enforce it. We are not asking this Court to pronounce said act unconstitutional or void. We are demanding nothing in contravention of said act. We may admit that Congress has *power* to pass an act, the execution of which will involve a breach of trust on the part of the Government. We admit that Congress has *power* to abrogate valid contracts legally entered into by the Government, without the consent of the other contracting party. Congress may at any time abolish a post route, notwithstanding a contract has been entered into for conveying the mails on that route for four years, and the contractor may have invested large sums of money in stage coaches, or steamers, to enable him to fulfill his part of the contract. Congress may at any time stop the construction of a custom-house or fortification, the building of which has been put under contract, and is in progress, and so put an end to the contract, to the great detriment of the contractor. But it by no means follows that the Government is under no obligation to make just compensation to the contractor for the damage he sustains by reason of the breach or abrogation of the contract. Before the Court of

Claims was instituted, it is true that the party injured had no remedy except by petition to Congress. But that Court was created for the very purpose of giving a remedy to persons aggrieved by the violation or non-performance of its contracts by the Government. Can it weaken the claim of this petitioner, that rights vested in him by virtue of a contract to which the Government was a party, have been taken away by an act of Congress, rather than by the act of some subordinate officer or agent of the Government?

In view of the great suffering that would have been inflicted upon *bona fide* purchasers of the lands between the Ludlow and Roberts lines, if the location of military warrants thereon had been permitted to ripen into legal titles, it was perhaps an excusable exercise of power on the part of Congress, to interpose and prevent it. If these purchasers had been evicted by military claimants, the Government would have been bound, upon the clearest principles of justice, to make compensation to *them*. It was, therefore, the cheapest as well as the most direct way to do justice to all parties, to prohibit the disturbance of said purchasers, and make compensation to such military claimants as might come forward and take the proper steps to establish their rights to the lands.

No holder of military warrants could show that his rights had been infringed by this legislation, until he had done exactly what has been done by the appellant's testator—that is to say, until he had located his warrants on said lands, or at least until he had produced the warrants and offered to locate them.

It has been urged that the act of Wallace in locating his warrants "was illegal, and a nullity, and conferred upon him no right or privilege whatever." But his acts were absolutely necessary to establish his *right* to the lands and his consequent claim to compensation, if that right was withheld by the Government. There is no other conceivable way in which a military claimant could estab-

lish any right to compensation, except by producing his warrant and offering to locate it on a specific portion of the land reserved for its satisfaction; nor could he well put his claim into a definite shape without an actual location and survey. It was necessary to identify the land which he proposed to enter, as well to fix the measure of his compensation as to protect the Government against the demands of future claimants.

It has been said, however, that subsequently to the locations under which the plaintiffs claimed in *Doddridge* vs. *Thompson*, and in *Reynolds* vs. *McArthur*, Congress has *established* Ludlow's line as the western boundary of the reservation.

To establish the boundary of the reservation is one thing, and to refuse to make titles to the locators of warrants within a certain portion of the reservation is a very different thing. Congress never assumed to permanently establish the Ludlow line as the western boundary of the reservation. By the act of 1812 it was provided that Ludlow's line should be considered as constituting the western boundary, *until one should be finally established with the consent of Virginia.*

By the third section of the act of April 11, 1818, (3 Stat., 423,) it was provided that south of the Greenville treaty line the Ludlow line "shall be considered and held" to be the western boundary "*until otherwise directed by law;*" and from the Greenville treaty line to the source of the Scioto river the Roberts line should be considered and held to be the westerly boundary of said reservation.

No subsequent act says anything about the *boundary line* of said reservation. Congress never assumed to have any authority to *establish* the boundary, without the consent or concurrence of the State of Virginia. On the contrary, by the acts of 1804 and 1812 Congress has in the most unequivocal manner admitted the equal right of Virginia to participate in the establishment of said boundary line. The act of 1818 not only admits that

said boundary line had not theretofore been established by law, but it clearly negatives the idea that it was the intention by that act to establish the Ludlow line as the boundary. It was to be "considered and held" as the boundary, *until a boundary should be established by law.* That is to say, the holders of military warrants were to be permitted to locate up to that line, but not beyond it, until a boundary should be established. This is the only resonable construction that can be given to the act. Subsequent acts prohibiting locations west of the Ludlow line do not pretend to establish that line as the boundary of the reservation. It was competent for Congress, in the exercise of its extraordinary power to abrogate the contracts of the Government, to withhold patents on military locations made west of that line, without establishing it as the boundary of the reservation. If Congress had power to *alter the boundary* of the reservation, and has exercised that power, it may be admitted that the location of a warrant outside of the boundary so established by Congress would not only vest in the locator no legal right to the land, but would confer upon him no legal right to compensation, which this Court could enforce. But if Congress has merely withheld from the locator a title to lands *within the acknowledged limits of the reservation*, it has no more destroyed his *rights* than it destroys the rights of a mail contractor by abolishing the post route on which his contract is based. It has merely, for prudential reasons, withheld a *specific* right, thereby incurring an obligation on the part of the Government to make compensation in another form.

We insist that since the passage of the act of 1818, providing that the Ludlow line should be "considered and held" as the boundary of the reservation "until otherwise directed by law," the Roberts line has in fact been *established by law* as the true western boundary of said district. There were two modes in which the boundary might be established by law. First, by joint or

concurrent legislation of both parties to the cession; second, by judicial decision. It has been established in the last-mentioned way, by two decisions of the highest judicial tribunal of the United States, in suits between parties directly and beneficially interested in the question.

The first of these cases, (that of *Doddridge* vs. *Thompson*,) was decided by the Supreme Court in 1824. This suit was brought for the purpose of establishing the boundary by judicial decision, and was defended by the United States, on the ground that having sold the lands to the tenants in possession, the Government would be bound to indemnify them if their title failed. The officers of the Government, on behalf of the United States, made up the agreed case on which the suit came up to the Supreme Court of the United States. It was there argued by the Attorney General, for and on behalf of the United States. The result was that the Roberts line was established as the true boundary by the Court. Immediately after this decision, Congress passed an act (of 26th May, 1824) authorizing the President to enter into negotiations with the locators of warrants between the Ludlow and Roberts lines, to ascertain on what terms they would relinquish their claims. This he did; but Congress manifested some reluctance to make an appropriation to satisfy these claims, and some dissatisfaction with the decision was felt, because the agreed case admitted the sources of the two rivers, Scioto and Little Miami, to be where the Commissioners of the United States, under the act of 1812, and of Virginia, had found them, and where the former had reported their head waters to be, in their report to the Commissioner of the General Land Office.

To quiet this doubt, the suit of *Reynolds* vs. *McArthur* was then brought by McArthur, who was plaintiff in the suit below. The United States defended this suit also. Accurate surveys and careful explorations were made, and the result was that by a verdict of a jury the actual sources of the two rivers were found to be where the Commis-

sioners of the two governments had located them in 1812. The case was brought up to the Supreme Court of the United States, where all the principles settled by the case of *Doddridge* vs. *Thompson* were re-affirmed, and Roberts' line again declared to be the true boundary. Congress then passed an act making an appropriation to pay for the claims of the holders of all warrants which had been located between the Ludlow and Roberts lines prior to the 26th of June, 1812; (act of 26th May, 1830, chap. 391.) This was a legislative acquiescence in, and affirmation of, the Roberts line as the true boundary.

These judicial decisions of the Supreme Court, thus acquiesced in, and practically affirmed by Congress, constituted an *establishment by law* of the Roberts line as the true boundary, and thus put an end to the condition during which the Ludlow line, under the act of 1818, was to be "considered and held" as the boundary. Not only so, but they annulled all legislation assuming to permanently establish any other boundary, if any such legislation had ever been enacted, which we deny. Whatever pretext the State of Virginia, or the holders of her military warrants might have for denying that these adjudications amounted to an establishment by law of the boundary of the reservation, surely the United States can have none.

This Court will not construe any of the acts of Congress relating to said reservation as establishing, or intending or assuming to establish the Ludlow line as its western boundary—

1st. Because the language of said acts will not bear that construction.

2d. Because Congress repeatedly, in legislating upon this subject, unequivocally recognized the equal right of Virginia to participate in establishing the boundary.

3d. Because, taking into view all that the Supreme Court has said on the subject, it clearly amounts to a declaration that Congress has not the power by its sole act to establish a *permanent* boundary of the reservation,

but only a *provisional* or *temporary* line to govern locations until a permanent boundary should be established by competent authority.

4th. Because there can be but one true boundary line under the deed of cession; and that being a compact between two sovereignties, cannot be altered without the consent of both. The Supreme Court having decided that Roberts' line is the true boundary, no other can be substituted without a change of the compact. This compact must be governed by the law of nations. (*Poore* vs. *Fleger*, 11 *Pet.*, 209; *Vattel*, *p.* 331, § 206; *Ib.*, 297, § 154.)

5th. Because if said acts are construed as merely prohibiting the acquisition of titles by the bounty-land claimants to lands *within the reservation*, they come within the scope of powers sometimes exercised by Congress in extraordinary cases; but if construed as actually *changing the boundary* of the reservation, they clearly transcend the powers of any government.

The former construction is consistent with the good faith of Congress, because it implies a promise or obligation to compensate the parties injured by such legislation. The latter construction renders said legislation a violation of all faith, and of the plainest principles of the law of nations.

REASONABLE TIME.

It is said that Congress waited a reasonable time for the bounty-land claimants to locate their warrants before appropriating these lands to the use of the Government.

What is a reasonable time within which to do an act under a contract is a question of fact to be decided by the circumstances of the case.

Public compacts are to be liberally and equitably construed and executed according to the understanding and intention of the contracting parties.

Vattel says the true interpretation consists in making in the particular cases that present themselves a just appli-

cation of what has been decreed in a general manner, and where a case arises that cannot be brought within the terms of the treaty, it must be resolved by inductions drawn from the general views of the contracting powers. (*Vattel*, p. 370, § 265.)

Both parties were to take part, and have taken part, in the execution of this compact.

Virginia was to issue the warrants, and the entry and surveys were to be made and have been made under her laws. The only part which the United States has taken in the execution of this trust has been to issue the patents on the certificates of the officers of Virginia.

Virginia has passed laws regulating the proof of bounty-land claims as late as 1815, and warrants issued in pursuance of these laws have always been recognized and held valid by the General Government. (11 *Hen. Stat.*, 562.) The prohibition against locations west of Ludlow's line ante-dates that period about three years; and at a still earlier date the lands west of that line had been surveyed and put into market as public lands, and many of them actually sold.

If the United States left it with Virginia to issue the warrants, that carried with it an implied agreement to satisfy them as long as any land remained in the reservation. Congress never interposed any objection to the continuation of the issuing of warrants by Virginia until the act of May 20, 1826, (4 Stat., 189,) which act provides "that no location shall be made by virtue of any warrant obtained after the first day of June, 1829." Again, by the act of 23d April, 1830, (4 Stat., 395,) it was provided "that no location shall be made by virtue of any warrant obtained after the first of January, 1832." Here we find Congress expressly recognizing the validity of warrants issued *twenty years* subsequent to the time when it is argued that Congress had rightfully decided that a reasonable time had elapsed for locating said warrants, and when, on that ground, the General Government was justified in

appropriating to its own use the lands held in trust for their satisfaction.

It is said that Congress was the proper judge as to what should be considered reasonable time for presenting the warrants for location. It is certainly not necessary for us to controvert this position; for Congress has from time to time admitted that a reasonable time had not elapsed, by extending the time for locating said warrants, down to as late a time as February 20, 1850.

The prohibition against locations west of Ludlow's line was never based on the assumption that a reasonable time had elapsed; but it was made because said lands had been sold, under a mistake, to innocent purchasers, whom it would a hardship to dispossess. It is an unnecessary impeachment of the good faith of Congress to assume that it was the intention of that body to take away the rights of those who were entitled to locate said lands, under the compact, and make no compensation therefor.

There has been no time since the true boundary has been ascertained and defined, in which the same disability to acquire a title by virtue of a bounty-land entry in the locality now in question, that existed when Wallace's entries were made, did not exist in equal force, and by virtue of the same authority. The act of 1812, under authority of which the Roberts line was run, made Ludlow's line the temporary boundary, so as to restrict locations to the east side thereof, until a boundary line should be established by agreement between the United States and Virginia. No line having been so agreed upon, this restriction remained until the passage of the act of 1818, by which it was continued as to all lands south of the Greenville treaty line. And this last-mentioned restriction remained, until the passage of the act of July 7, 1838, in which it was repeated, without any qualification as to the Greenville treaty line.

And so, according to the argument we are reviewing, the military claimants lost their rights to the lands in

question by lapse of time, before they ever had an opportunity to assert them.

JURISDICTION OF THE COURT.

It has been insisted that the Court of Claims cannot give compensation for damages resulting from the execution of an act of Congress. This position we controvert, and contend that the Government is answerable in said Court for any pecuniary loss or damage resulting to any citizen from the violation or non-performance of its contracts, or from the breach of any accepted trust created by contract, on the same principle that one citizen is answerable to another in like cases before the ordinary courts of justice. The only difference that ever existed between the liability of the Government upon its contracts and that of a private person, consisted in that immunity from suit which is an incident of sovereignty. By creating the Court of Claims, the Government has, as to all matters within the scope of the jurisdiction conferred upon it, waived that immunity, and put itself on the footing of a private person or corporation. We have only to inquire, is this a claim which could be enforced against a private person standing in the place of the Government before an ordinary judicial tribunal, and does the subject-matter of it come within the jurisdiction conferred by law upon said court? Surely, the liability of the Government is no less clear because the breach of contract or of trust has been committed by authority of an act of Congress, than if committed by authority of some inferior department or subordinate officer. Nor can it make any difference whether the breach has been committed willfully and knowingly, or by inadvertence and mistake.

In *Paup* vs. *Drew*, (10 *How.*, 222,) the Court say: "No court can sanction the violation of a trust, but will always act upon the presumption that it will be faithfully executed. And this is especially the case *where a trust is vested in a State*, which is not amenable to judicial process."

And in *Comegys* vs. *Vass*, (1 *Pet.*, 193,) the Court say: "It is not universally, although it may be ordinarily, the test of a right that it may be enforced in a court of justice. Claims and debts due by a sovereign are not commonly capable of being enforced. It does not follow that because an unjust sentence cannot be reversed, the party injured has lost all right to justice, or all claim upon principles of public law to remuneration."

"There is a distinction between *power* and *right*, which is, that power, when exerted in opposition to right, is divested of every title." (*Wilson's Lectures*, 1 vol., 458.)

FINDING OF THE COURT OF CLAIMS.

I will be seen that the Court below found all the facts precisely as claimed by the appellant, and as above set forth.

Said Court based its adverse decision on two legal propositions, to wit:

1st. "That Ludlow's line was rightfully established as the western boundary of the reservation in the deed of cession from Virginia to the United States, of March 1, 1784, by the acts of Congress of June 26, 1812, and April 11, 1818; and that, therefore, the claimant's warrants were not located within the boundaries of said reservation."

2d. "That the proviso in the act of May 20, 1826, and in the acts subsequent thereto, giving an extension of time within which military warrants might be located, was a condition upon which alone the claimant could be allowed the benefits of such extension of time for the location and return of surveys upon his warrants."

In reference to the first proposition above quoted, we remark, that in the opinion of the Court below, delivered by Mr. Justice Wilmot, it is admitted that Roberts' line is the *true* boundary line of the reservation, but it is denied that it is the *lawful* boundary. It is said that "the sources of the Scioto and Little Miami rivers, and a

straight line between these points, gave the *true* boundary, but not necessarily the *lawful* one." "How often," say the Court, "is the *true* boundary between individual litigants set aside and another established by the decision of courts as *legal*," &c.

We deny that when a boundary has been established by compact, any other boundary but the *true* one, so established, can be made the *lawful* boundary, by the act of *one* only of the contracting parties. Of course it is competent for both parties, by express agreement, to establish a different boundary from the *true* one, and so make it the *legal* boundary. Or they may, by their joint acts, or by mutual acquiescence, establish a different boundary from the *true* one, as established by the original compact. But there is no pretence that Virginia, or her military claimants, ever by express contract or by acquiescence, agreed to the establishment of Ludlow's line as the *lawful* boundary.

We also admit that a boundary, different from what is in fact the *true* boundary, may sometimes be established as the *lawful* boundary, by the judgment of a court of competent jurisdiction. But in this case it is Roberts' line, and not Ludlow's, that has been so established, not only as the *lawful*, but as the *true* boundary.

In reference to the second proposition above quoted, we remark, that it is nothing more than a reiteration, in another form of words, of what was admitted throughout the arguments for the claimant. We have never denied that Congress had *power* to prohibit the location of warrants, and the grant of patents thereon, in any part of the reservation, nor that Congress *did*, by the acts of May 20, 1826, and the acts subsequent thereto, so prohibit the location of warrants west of Ludlow's line. But whether Congress had the *right* so to prohibit the location of warrants within the acknowledged boundaries of the reservation, is another question.

It will not do to attempt to justify the prohibition upon the ground that Congress had the right to determine what was a *reasonable time* in which the military warrants issued by Virginia should be located. What was a reasonable time for locating in one part of the reservation was a reasonable time for all parts. If there was any difference, it was in favor of locations between the lines of Ludlow and of Roberts—first, because for a time a portion of said lands were in the occupancy of the Indians; and, 2d, because for a still longer time they were supposed not to be within the bounds of the reservation.

That in the judgment of Congress, a reasonable time for making locations had not elapsed when the act of May 20, 1826, and "the acts subsequent thereto," prohibiting locations west of Ludlow's line were passed, and at the time appellant's testator made his locations, is evidenced by the fact that long subsequent thereto Congress expressly authorized locations to be made in other parts of the reservation.

The prohibition, therefore, contained in "the proviso to the act of May 20, 1826, and in the acts subsequent thereto," could not have been made on the ground that the Virginia military claimants had no right to the lands between Ludlow's and Roberts' lines, nor on the ground that they had lost the right to locate their warrants on said lands by lapse of time; but must have been made upon the ground that the said lands having been sold to innocent purchasers, under a mistake, Congress would not allow said purchasers to be evicted. It is clear that Congress could not thus protect these purchasers except by withholding from the military warrantees a clear and perfect *right*.

Congress has *power* to take private property for public use. But no one will contend that Congress has any *right* to do so without making just compensation to the owner. Congress denied to the Virginia military

warrantees a clear and perfect right from motives of public policy. This we admit Congress had *power* to do, but had no *right* to do it, without making just compensation to those whose rights were thus taken away.

J. J. COOMBS,
Counsel for Appellant.

Supreme Court of the United States.

MATTHEW BONNER,

EXECUTOR OF THE LAST WILL OF CADWALLADER WALLACE,

Appellant.

vs.

THE UNITED STATES.

Addenda to Appellant's Brief.

On the argument of this cause appellant's counsel will refer to the following named documents and authorities:

1st. 18th Congress, 2d sess.; Senate Document No. 37, pages 10 and 11.

2d. American State Papers, vol. 1, page 6; Report of "Superintendents for Continental Line" of Virginia to lieutenant-governor of that state, reprinted in House Doc., No. 457, 28th Congress, 1st sess., pages 70, 71.

3d. 30th Congress, 1st sess.; Senate Doc. No. 10, page 45, Diagram.

4th. Document of House of Delegates of Va., No. 46, A. D. 1851; Report of Committee on subject of Revolutionary Claims.

5th. Story's Equity Juris., vol. 1, § 60; Ibid., vol. 2, § 962.

Appellant's counsel will also present, by way of argument, the annexed copy of an opinion given by the late Hon. S. F. Vinton, on the subject of the claim in controversy.

J. J. COOMBS,
Counsel for Appellant.

OPINION OF HON. S. F. VINTON

ON THE CLAIM OF

CADWALLADER WALLACE.

WASHINGTON CITY, *February* 20, 1852.

SIR: I am in receipt of your letter of the 7th instant, in which you state that at the time you made certain entries on Virginia military warrants in that part of the Virginia military reservation in the State of Ohio, which lies between Ludlow's and Roberts' lines, in the month of January, 1839, it was then a well known and admitted fact that *the whole quantity of good land* within the limits of the reservation was insufficient to satisfy the bounty land warrants issued by the commonwealth of Virginia to her troops on continental establishment; and that it was also a fact equally well known and admitted, that except between Ludlow's and Roberts' lines, there were then *no good lands* remaining unlocated within the limits of the reservation on which your warrants could be laid.

In view of these facts, you ask me for my legal opinion upon the following questions:

1st. Had Congress a right to appropriate to itself any part of the lands within the limits of the reservation, to the exclusion of the bounty land claimants?

2d. If Congress had not such right, what ought to be the rule of compensation to those who located their warrants on the lands thus appropriated by the government?

At your request, in January, 1839, I gave you my opinion respecting these entries, which has been printed among the documents in your case. Since the receipt of your letter I have carefully reviewed that opinion, and am still satisfied of the correctness of all its conclusions. You now, however, submit for my opinion the two specific interrogatories stated above, which I shall proceed to consider in the order in which they are propounded.

To give an intelligent answer to the first inquiry, it will be necessary to revert to the origin and object of the reservation, and also to notice some of the voluminous legislation of Congress and the judicial decisions respecting the reservation. Virginia, during the war of the revolution, and prior to her deed of cession to Congress of the territory beyond the Ohio river, promised bounty lands to her troops on continental establishment, and had set apart for their satisfaction, a district of country within the limits of the present State of Kentucky, upon the waters of the Cumberland river, and between the Green river and Tennessee. A doubt having arisen whether the district of country first set apart was large enough to satisfy the bounties, she insisted upon making provision in her deed of cession for such deficiency, if any, as might be found to exist. Accordingly, the country between the Scioto and Little Miami rivers, in the present State of Ohio, was reserved for that purpose. The deed of cession makes the reservation in these words: "That in case the quantity of good land on the southeast side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee, which has been reserved by law for the Virginia troops on continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency shall be made up to said troops *in good lands*, to be laid off between the rivers Scioto and Little Miami, on the northwest side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia."

The residue of the territory beyond the Ohio was ceded to Congress in trust as a common fund for the use and benefit of the United States, "to be faithfully and *bona fide* disposed for that purpose, and for no other use or purpose whatever."

Congress, therefore, by virtue of this deed, was a trustee for the bounty land claimants, and also for the Confederacy. Before proceeding further, it may not be out of place to remark, that the true meaning and legal effect of this reservation is too plain to be the subject of doubt or dispute. If it should turn out that there was good land enough on the waters of the Cumberland to satisfy all the bounties, the whole reservation between the Scioto

and Little Miami rivers, would belong to the United States, and fall into the mass of the common fund.

If there was not enough, but the deficiency was less in quantity than the good lands between the Scioto and Little Miami, then the surplus only would belong to the United States, and fall into the common fund.

But if the deficiency was equal to, or exceeded, the whole quantity of good land in the reservation, then the entire territory reserved, belonged to the bounty land claimants. In that case the grant gave the United States no interest in it, and no part of it could be taken for the use of the common fund, without a breach of trust.

These are plain propositions, which should be kept always present to the mind in an inquiry into the disposition that has since been made of the reservation. For the rights, duties, and obligations of the United States will essentially vary by reducing to a certainty any one of the above-mentioned contingent facts, since the establishment of any one of them necessarily proves the non-existence of the other two. To get a starting point, therefore, from which to reason and deduce a correct opinion, it is important to inquire whether there was any deficiency of *good land* on the waters of the Cumberland, and if so, was it equal to the whole, or a part only of the *good lands* in the Scioto and Miami reservation. It can be clearly shown that the deficiency was not only equal to, but exceeded the whole quantity of good land in the reserved territory. At the time of the deed of cession, as appears on the face of the instrument itself, it was regarded as doubtful whether there would be any deficiency to be supplied, and the reservation was evidently made by Virginia as a precautionary measure, to insure the certain fulfilment of her promised bounties to her troops on continental establishment. It was not until the 10th of August, 1790, six years after the cession, that Congress admitted the existence of a deficiency. An act was then passed to authorize the location of as much land in the reservation as would make good the deficiency. (Laws of the U. S., chap. 40.) It appears from the language of that act that it was then believed the deficiency would absorb a part only of the reservation. And accordingly, acting on that supposition, Congress, by the acts of the 3d of March, 1803, (chap. 21,) and the 23d of March, 1804, (chap. 33,) made provision for disposing of the sur-

plus that would remain after the bounty land warrants had been satisfied.

Various acts were subsequently passed extending the time for making locations on military warrants; but all apparently proceeding on the same idea, until the act of the 30th of May, 1830 (chap. 215.) By the 7th section of that act authority was given to convert those warrants, to the amount of fifty thousand acres, into certificates of land scrip, which were made receivable at any of the United States land offices in payment of lands subject to entry at private sale. This was done because it was then known the good lands in the reservation had been exhausted. It was a voluntary gratuity to put the holders of warrants remaining unsatisfied on the footing of those who had been fortunate enough to make locations on good lands within the military district. This was done, no doubt, upon the equitable consideration, that it must have been the intention of the parties to the deed of cession, to make provision for all the military rights. It is, therefore, a very strong and conclusive admission that the reservation did not contain good land enough to supply the deficiency. In 1832 and 1833 other acts were passed making like provision for a still larger amount of land scrip. This short review shows that from 1784 to 1790 Congress legislated on the assumption that the fact of a deficiency had not been established. From 1790 to 1830, on the assumption that a deficiency did exist, but not large enough to absorb all the good lands of the reservation. Since 1830 it has proceeded on the admission of the well known fact that the good lands in the reservation were not equal to the deficiency. This important fact is abundantly proved by the testimony in your case.

It is very material to keep in recollection that all the decisions of the Supreme Court of the United States, in which they have expressed opinions concerning the powers and duties of Congress in respect to the reservation, were made during the period when it was believed, and while Congress was legislating on the supposition, that there would be a surplus after satisfying the military bounties. And in accordance with the then prevailing opinion, the court makes the assumed existence of this fact the basis of all its reasoning on those powers and duties.

This is distinctly shown in the case of *Jackson vs. Clarke*,

1 *Pet.*, 634, as well as in all the other cases where the powers of Congress over the reservation have been the subject of judicial comment.

In that case, after citing the language of the deed of cession, which has been already copied above, the court proceed to say "this is not a reservation of the whole tract of country lying between the rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line on continental establishment on the south-east side of the Ohio. The reservation is made in terms which indicate some doubt respecting the existence of the deficiency, and an opinion that it will not be very considerable. * * * The residue of the lands are ceded to the United States for the benefit of said States, to be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the confederation, or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever."

"The government of the United States, then, received this territory in trust not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation, and this trust is to be executed 'by a faithful and *bona fide*' disposition of the lands for that purpose. We cannot take a retrospective view of the then situation of the United States, without perceiving the importance which must have been attached to this part of the trust. A heavy foreign and domestic debt, part of the price paid for independence, pressed upon the government, and the vacant lands constituted the only certain fund for its discharge. Although, then, the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view that other object which was of vital interest.

"This was to be effected only by prescribing the time within which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be considerable, to the other purposes of the trust."

The power of Congress over the reservation is here placed upon the basis that it was its right and duty so to legislate as in a reasonable time to separate the surplus land from the military claims, and by so doing, execute the secondary as well as the primary trust. It assumes that such surplus in fact existed, and that the reservation was in point of fact and of law covered by an actual and valuable (not a valueless non-existent) secondary trust, which it was the duty of Congress to look to and provide for while it carried the primary trust into effect.

Suppose in that case it had been an established and admitted fact, that the primary claim had absorbed or would absorb the whole territory reserved, would not such admission remove the foundation on which the argument of the court is built? Let us imagine, by way of putting this question to a test, that a claimant under the primary, and one under the secondary trust, had been antagonist parties, and it had been an admitted fact, that the whole fund was insufficient to meet the demands of the primary trust, can there be any doubt who in such case must prevail? Suppose, also, that in such case the primary claimant had brought the trustee into court, and should insist that he should restore what he had given to the secondary claimant, or make compensation, could he stand up before a chancellor in a court of equity in opposition to such a demand for a single minute? Surely not. And how does the case last supposed differ from your case? In nothing that I can perceive, except that in your case the trustee (the government) instead of appropriating the fund to the use of the postponed beneficiary, has put the proceeds of the misapplication into its own coffers, where they now are. And, certainly, that fact would be far from aiding the defence of the trustee in a court of equity. What are the facts in your case? They are these: 1st. It has been decided by the Supreme Court of the United States, that the primary trust attached to the *whole* territory reserved by the deed of cession.—(*Doddridge vs. Thomson*, 9 *Wheaton*, 469.) 2d. It has been twice adjudged by that court, that the country between Ludlow's and Robert's lines, where your locations were made, is within the limits of the reservation.—(*Doddridge vs. Thomson*, 9 *Wheat.*, 469. *Reynolds vs. McArthur*, 2 *Pet.*, 417.) 3d. It was adjudged in both of those cases that no act of Congress ever authorized the sale of the lands between Ludlow's and Roberts'

lines as public land, and, consequently, that the sale thereof by the land officers was without authority of law and void; and no act authorizing their sale has since been passed. 4th. It is now an established fact, that the primary claim exceeds in amount the whole quantity of good land in the reservation. 5th. It is an admitted fact, also, that the United States has, through the unauthorized acts of its land officers, appropriated a part of the good lands, (being the same on which your locations are made,) to the use and benefit of the secondary claim; that is to say, the United States thus sold the land and put the money into its treasury. And the simple question is, shall restoration be made to the primary claim? It may be said in reply to this, and it is all that I am aware can be said, that an act of Congress had made Ludlow's line the boundary of the reservation, and that after its passage you located your warrants beyond it. It has, as stated above, been twice directly decided by the Supreme Court of the United States, that Ludlow's line encroaches on the reservation—that its true western boundary is Roberts' line, between which and Ludlow's your locations were made. Without, therefore, for the present calling in question the legislative power of Congress to make any other than the true line the boundary, I will say that this objection can avail nothing; because no one can deny, that if Congress, in the exertion of its legislative power, violate or impair a trust which it had promised faithfully to execute, it must make compensation to the beneficiary for his loss. And if, in any case, there could be a difference in the obligation incurred, by an intentional violation, and a violation of a trust without intention, there surely can be none where the proceeds of the violation, as in this case, have been paid into the Treasury of the United States.

But it may be questioned, whether Congress had the power to establish a boundary which would be binding on the beneficiary without his consent. The Supreme Court of the United States, in the case of Doddridge *vs.* Thompson, expressed an opinion that as Congress took a grant of the reservation in trust for the military claimants, and also of the adjoining country beyond it, in trust for the confederacy, that as incident to the duty of executing both trusts, it had the power to establish a boundary between the two trust estates.

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It may be remarked upon this dictum, in the first place,

that the question whether Congress had the power to establish the boundary of the reservation without the consent of the other party to the deed of cession, was not then before the court, nor has it ever been submitted to the decision of that tribunal. In that case one of the parties had made locations of military warrants between Ludlow's and Roberts' lines before the passage of the act making the former line the boundary; and the court, without questioning the right of Congress to pass the act, (which they were not called upon to question,) held that before the passage of that act the whole extent of the reservation was open to location, and that the subsequent establishment of a line which encroached on the limits of the reservation, and threw the locations between and outside of it, could not have the retrospecting effect to impair the prior vested rights of the party.

It may be remarked, in the second place, that on examination of all that the court has said on this subject, it is quite certain that while, in its opinion, Congress, for the purpose of executing the trusts conferred upon it by the cession, had the power to establish a temporary boundary for the reservation, yet it had not the power to establish a permanent one, binding upon and concluding the rights of the beneficiary, without the consent of the other party to the grant. And this is the interpretation also, which, prior to the act establishing Ludlow's line, had been put upon this grant by both parties to the cession, (Virginia and the United States) and would seem to estop the latter from subsequently claiming a right to establish a permanent boundary without the consent of the former.

Some time in the year 1802, Ludlow, who was a United States surveyor, ran an experimental line about half the length of the western boundary of the reservation, when his further progress was arrested by the Indians. In 1804, the line still remaining unfinished, and it being unknown whether it, in fact, was the true boundary or not, Congress passed an act declaring that this line should be the boundary of the reservation, "provided that the State of Virginia shall, within two years after the passage of this act, recognize such line as the true boundary of the territory." This is a plain admission of the right of Virginia to have a voice in the establishment of the boundary; and, as it was the first essay towards its settlement, it is an interpretation of the deed of cession, which de-

monstrates conclusively what was the understanding of Congress on this subject. Virginia did not assent, and, consequently, the act did not go into effect. If Congress had the power to make a final settlement of the boundary, why ask the consent of Virginia to the act?

This subject was permitted to rest until the year 1812, when Congress made another endeavor to settle this boundary line. The act of that year directs the President of the United States to send out commissioners, to be met by commissioners on the part of Virginia, "for the purpose of ascertaining the said line." The commissioners of the general government, in case they were not met by commissioners from Virginia, were required to ascertain and run the boundary, and make report to the Commissioner of the General Land Office. The act also declares "that, until the westwardly boundary line of said reservation shall be finally established *by the agreement and consent of the United States and the State of Virginia*," Ludlow's line should "be considered and held as the proper boundary line."

Here, again, at the end of eight years, is another express admission by Congress that it had no right to make a final settlement of this boundary without the consent of Virginia. The legislature of Virginia responded to this act of Congress, and passed a law to send out commissioners to meet those of the United States. This, on her part, is an assertion of her right to have a voice in the settlement of the line. Surely it cannot be claimed that both of these parties were acting in ignorance of their rights; nor is it easy to understand how, in the face of these solemn legislative acts of both parties, putting their several and joint interpretation on the deed of cession, either party can successfully set up a claim to establish the *permanent* boundary without the consent of the other.

In the above-mentioned case of Doddridge vs. Thompson, (9 Wheaton, 477,) the court comments particularly upon the act of 1804. They say: "This act shows, we think, very clearly that Congress did not mean to assert a power to fix the western boundary of the military reserve. The deed of cession and the act of acceptance were considered as forming a contract respecting a territory, the western line of which could not, at that time, be fixed with precision, and which was unavoidably de-

scribed in terms requiring subsequent explanation and adjustment. This adjustment was to be made, not by one of the parties, but by both; and this act is an essay towards it. Congress makes a proposition to Virginia by which the United States are to be bound, provided Virginia accepts it within two years. If it be not accepted within that time, the parties stand on their original rights as if it had never been made. This is a very fair and equitable proceeding on the part of the government, and is founded on the idea that the rights of the parties were equal." In the course of their opinion in that case, the court comment also on the act of 1812. They say: "The commissioners of the United States were met by those of Virginia, and they proceeded to ascertain the sources of the two rivers, and employed a Mr. Charles Roberts to survey and mark a line from the source of one to that of the other. This is called *Roberts' line*, and is reported by the commissioners to the Executive, and is found, in the case agreed, to represent truly a line from the source of the Little Miami to the source of the Scioto. The Virginia commissioners, however, refused to accede to this line, and claimed to run from the source of the Scioto a straight line to the mouth of the Little Miami, which would pass south of that river, and include a considerable tract of country not lying between that line and the Scioto. This demand prevented an agreement establishing Roberts' line; and, as the act of June, 1812, *provisionally designated* Ludlow's line as the western boundary of the reserve until one should be *finally established with the consent of Virginia*, it remains the boundary for the present."

Taking into one view all that the Supreme Court has said on this topic, and it should be taken altogether as one whole, it amounts to a declaration that Congress has not the power, by its sole act, to establish the *permanent* boundary of the reservation; but, for the purpose of executing the trust created by the deed of cession, it might prescribe a *provisional or temporary* line to remain the boundary until a final establishment of it, and no longer; and the acts of 1804 and 1812 carry on their face an implied engagement that when the line should be established the whole territory embraced by it should be subject to the satisfaction of the bounty rights, otherwise it would be, not merely an idle act, but, worse than that,

a fraudulent insincerity, to ask Virginia to consent to a boundary which, when agreed to by her, Congress did not intend to be bound by or respect.

As has already been stated, all the legislation of Congress prior to 1830 proceeded on the idea that the military rights would not absorb the whole of the good lands in the reservation. So long as this opinion prevailed, and while the boundary remained without adjustment, it was, perhaps, an excusable prudence on the part of Congress to prescribe a line within the extreme and actual limits of the reservation, provided it left, subject to location within the prescribed boundaries, good land enough to satisfy the primary claimants. But whenever the boundary should be finally established, or the fact disclosed that there was not good land enough in the reservation to absorb the bounty rights, then Congress could no longer, without a plain breach of trust, withhold any part of the territory from military location. And it is alone on the expectation that there would be a surplus that the course of Congress can be vindicated from bad faith, in permitting Ludlow's line to remain the boundary, and suffering the lands between it and Roberts' line to be sold as government land, after the report of the commissioners, under the act of 1812, had rendered it certain that the reservation did, in fact, extend as far west as the latter line.

There were two modes of accomplishing a final settlement of the boundary. It might be brought about by the agreement of both parties to the cession, or it could be done by judicial decision. The legal effect of either mode would be the same. Congress, as has been shown, made two unsuccessful endeavors to establish the boundary by agreement. Finally, the suit of Doddridge vs. Thompson was brought for the purpose of establishing the boundary by judicial decision. The United States defended the case. The officers of the government, on behalf of the United States, made up the agreed case on which the suit came up to the Supreme Court of the United States. It was there argued by the Attorney General for the United States. The result was that Roberts' line was established as the true boundary by the court. Immediately after this decision, Congress passed the act of the 26th May, 1824, authorizing the President to enter into negotiations with the locators of warrants

between Ludlow's and Roberts' lines to ascertain on what terms they would relinquish their claims. This he did, but some reluctance was manifested in Congress against making an appropriation to satisfy these claims, and some dissatisfaction with the decision was felt because the agreed case admitted the sources of the two rivers, Scioto and Little Miami, to be where the commissioners of the United States, under the act of 1812, and of Virginia, had found them, and where the former had reported their head waters to be in their report to the Commissioner of the General Land Office.

These were very important facts, since the Supreme Court decided that the true western boundary of the reservation was a direct line drawn from the source of one river to the source of the other. To quiet this doubt, the suit of Reynolds vs. McArthur was then brought by McArthur, who was plaintiff in the court below. The United States defended this suit also. Accurate surveys and careful explorations were made, and the result was that, by a verdict of a jury, the actual sources of the two rivers were found to be where the commissioners of the two governments had located them in 1812. The case was brought up to the Supreme Court of the United States, where all the principles settled by the case of Doddridge vs. Thompson were reaffirmed, and Roberts' line again declared to be the true boundary. Congress then passed an act making an appropriation to pay for the claims of the holders of all warrants whose locations between Ludlow's and Roberts' lines came within the principles settled by the Supreme Court in those cases. This was a legislative acquiescence in, and affirmance of, Roberts' line as the true boundary. And thus that line is finally and authoritatively established. This last decision was in the year 1829. Subsequent to that time you laid your military warrants on the then remaining unlocated lands between Ludlow's and Roberts' lines. And here the question presents itself, what effect had this decision on the prior legislation of Congress, prescribing Ludlow's line as the boundary? The Supreme Court, as we have seen, had decided that Congress had not the power, by its own sole act, to establish a final and permanent boundary; but, for the purpose of enabling it to execute the trusts created by the deeds of cession, it might declare a provisional boundary, to continue in

force until such final establishment. This right of Congress is placed by the court on the necessity of the case. It is evident, therefore, that whenever a final establishment was had, this necessity ceased to exist, and the provisional laws enacted for want of such establishment, and waiting for it, were thereby superseded and at an end.

It has been already said that, whether the final establishment of the boundary was brought about by the agreement of the two governments or by judicial decision, the legal effect is the same. Suppose, in 1829, the two governments, by agreement, had established Roberts' line, would it not have annulled all the legislation of Congress in conflict with it, and opened the country between it and Ludlow's line to the satisfaction of your warrants? Certainly it would. And if the establishment by judicial decision have the same effect as though made by the agreement of both parties, as it must have unless it be a nullity, then, from the time of this decision, the legislation of Congress prescribing a boundary in conflict with it, was thereby superseded, and you had a legal right, as well as an indisputable right in equity, to lay your warrants on the unlocated lands within the established limits of the reservation. And if, under these circumstances, the government withholds a patent from you, and thus prevents you by this obstruction, as it in fact does, from asserting your rights before a judicial tribunal, that is an injustice which adds new force to your claim when an appeal for redress is made to Congress. Congress, as was said by the Supreme Court, undertook, "faithfully and *bona fide*," to execute the trusts created by the deed of cession. The trust fund being, in fact, insufficient to satisfy the primary trust, on what principle can that be justified as a *faithful execution* which inverts the order of priority, and gives to the secondary claimant the trust fund, or any part of it, to the exclusion of the primary claim? It is difficult to imagine a ground of justification for it.

For these reasons, I answer your first question in the negative, and am of opinion that, inasmuch as there was no surplus after satisfying the primary trust, Congess had not the right to appropriate to the use of the general government any part of the lands within the limits of the reservation, to the exclusion of the bounty land claimants,

and that it is morally and in equity bound to make compensation to you.

This brings me to the consideration of your other question, viz: If Congress had not such right, what ought to be the rule of compensation for the lands located by you, and which the government has appropriated to itself?

If such a question between two private suitors were presented to a chancellor for his decision, he would decree a conveyance and surrender of the land to the claimant under the primary trust. But this would be an act of great hardship on those who are innocent purchasers of the government; and I understand you do not desire to disturb them in the enjoyment of their possessions. If, under the circumstances, a chancellor should leave the occupants in possession, and substitute a money compensation, he would give the value of the land exclusive of improvements. This is what you would have a right in equity to claim, and which was recognized by Congress to be the proper rule of compensation to those whose locations, between Ludlow's and Roberts' lines, were made prior to the decision in the case of Doddridge, lessee *vs.* Thompson & Wright. (See act of the 26th of May, 1824, chap. 188, and act of the 26th of May, 1830, chap. 105.) The rule of equity and the acts of Congress, both concur in furnishing a precedent, and relieve you from all doubt or difficulties on that branch of your case. In their case the appraisement of their lands, exclusive of improvements, was made by persons appointed by the United States. The money to pay the appraised value of their lands, was appropriated by Congress and received by them; and the titles of those who purchased of government, were thus quieted. I do not see how objection can be made to following this precedent, and extending to you the same rule of compensation. You are entitled to that or to nothing.

As your warrants cover all the land between Ludlow's and Roberts' lines, not already compensated for by those former acts of Congress, there could be no further claim on the government for indemnity. But, instead of insisting on a money compensation, I understand from you that you are weary of delay and anxions to realize whatever you do get, as soon as possible; and therefore you will consent to take the appraised value of the land ex-

clusive of improvements, to be paid in land scrip receivable as money in the purchase of public land. At the same time, you will relinquish your claims to the United States, and thus quiet the titles of those who purchased of the government, and are now in possession of the land. Considering the immense mass of military warrants now issued and about to be issued, and thrown upon the market, such scrip must fall very far below the value of a money compensation. The probable depreciation will be all of fifty per cent., and perhaps even more than that. I understand from you that you are willing to receive payment in such a medium, not because it is just, but solely in the hope it will bring about the passage of a law for your relief at the present session of Congress, and thus enable you to bring this long pending claim to a final close. To all this I have only to remark, that I know of no principle of law or equity that would require you to make this sacrifice, and if you could go into a court of equity for relief, you would not be compelled to submit to it; but if you are content with this, with my views of your claim, it should be accorded to you by Congress without hesitation. That body is always disposed to do what is equitable and right, and if it had time to examine and understand your claim, I am satisfied it would not further delay to award you that justice which has been so long withheld.

I am, very respectfully, your most obedient servant,

SAML. F. VINTON.

To Cadwallader Wallace, Esq.

In the Court of Claims of the United States.

DECEMBER TERM, 1869.

MATTHEW BONNER, EXECUTOR OF CADWALLADER WALLACE, APPELLANT,
vs.
THE UNITED STATES.
} No. 265.

Brief for the United States.

STATEMENT OF FACTS.

In 1838, the claimant's testator, Cadwallader Wallace, owned military bounty land warrants, issued for services of troops of Virginia on the continental establishment, calling for forty-one thousand one hundred and forty-two and five-sixth acres. For the satisfaction of such warrants that State early set apart a district of country on the southeast side of the Ohio River, within the limits, as at present, of the State of Kentucky. Afterward, in ceding to the United States her territory northwest of that river, against a possible deficiency of this provision, a further reservation was made of all the lands between the Rivers Scioto and Little Miami. The lands in the district first set apart proving deficient, this second reservation on the other side of the river became absolute. To ascertain the limits of this second reservation it was necessary to find the sources of these two rivers, and to run the line between them. By an act of Congress approved April 11, 1818, this line was de-

termined. (Stat. at Large, vol. 3, p. 424, chap. xlvii, sec. 3.) Twenty years later, that is, in 1838, the testator entered his warrants on lands excluded from this reservation by the boundary thus fixed by Congress. Patents of the lands thus located were refused to the testator, and, in fact, prior to his entries, all these lands had been disposed of to other parties.

The petition to the Court of Claims presenting these statements concluded in alternatives, asking, 1. The value of said lands estimated as in a state of nature; 2. The money received from their sale with interest from the close of that session when he first presented his petition for relief; or 3. Land scrip for the amount of money received, with interest as above; in either case his warrants to be assigned and transferred to the United States.

POINTS OF LAW.

I. (*a.*) So far as this claim demands an issue of land scrip for its satisfaction, it is ample defense that thus far it is not a money claim, and, accordingly, not within the jurisdiction of the Court of Claims.

U. S. *vs.* Alire, 6 Wallace, 573.

(*b.*) To the appellant's demand for the value of the specific lands upon which testator's warrants were located, or for the sum received for those sold, it is sufficient answer that such locations being unauthorized by law carried no title whatever to those particular lands, and that, accordingly, the claimant is in no view entitled to *their* value. At best a land warrant not located carries no title to any particular, any located lands; it gives merely a right to lands to be thereafter selected, or located, and this selection, or location, as the term in use is, in order to be valid, must be authorized by law, by statute enacted.

Passing these objections others occur.

II. The claim appears to rest on the assertion that the lands thus entered were actually a part of those reserved for the satisfaction of land warrants, such as those owned by the testator, as the boundary of the reservation was accurately determined by a line between the sources of these two rivers run by one Charles Roberts in 1812.

It is first in order to rebut this assertion by the following statement:

The act of Congress of April 11, 1818, fixed, from that day forth, the boundary of the lands reserved for satisfaction of Virginia military bounty land warrants, and thereafter there could be no lawful entry of such warrants on lands excluded from that reservation by the boundary thus established by law. This view has been adopted by the Supreme Court, in the case of Reynolds *vs.* McArthur (2 Peters, 434, 435). The authority of Congress to establish such a boundary had been expressly recognized by the same court in the earlier case of Doddridge *vs.* Thompson (9 Wheaton, 478, 479), where the court declare one line to be the lawful boundary, while another line is found in the case to be the scientifically true line.

The case here cited was made up by facts occurring prior to the act of 1818, and thus was decided according to legislation of earlier date; but it is to be noticed that the statute then cited, that of 1812 (vol. 5, p. 765 and p. 274), also excluded the lands entered by the claimant's testator from the limits of the reservation. That act established Ludlow's as the line between the two rivers; and Ludlow's line, as the petition states, excluded the lands entered. It was only Roberts's line that included them—that part of Roberts's line which was not established by the act of 1818; this last act not altering the line before established with reference to the lands in question.

III. But the statutes, which, by fixing the boundary line of this reservation, excluded the lands entered by

the appellant's testator therefrom, are not the only laws which tend to invalidate and make void that entry.

The act of March 23, 1804 (II, 274), required persons entitled to bounty lands in this reservation to locate their lands within three years thereafter; and released all lands within that reservation, not located within that time, from all claims for such bounty lands.

March 2, 1807 (II. 425), a further time of three years was allowed for such locations; but, with this additional restriction, that no locations should be made on tracts of land for which patents had been previously issued, or which had been previously surveyed. Further extensions of time for such location were allowed by subsequent statutes; but always with the restriction just stated as incorporated in the act of 1807. (See acts of following dates: April 11, 1818, III, 423; March 1, 1823, III, 772; July 7, 1838, V, 262.)

(*a.*) That Congress had authority thus to regulate the location of these warrants, this court has directly decided. (See Jackson vs. Clark, 1, Pet., 633, 634.)

(*b.*) The locations made by the testator were, as his petition sets forth, made on lands already sold or otherwise disposed of by the United States; that is, on lands already patented or granted by act of Congress; and for the most part were thus locations expressly forbidden by the proviso enacted in 1807.

IV. But, aside from these sufficient matters in defense, there is a defect in the appellant's case, apparent upon its face. He alleges against the defendant the violation of no act of Congress, of no regulation of an executive department, and of no contract with the United States. He claims merely as the holder of a Virginia bounty land warrant, an instrument which, as stated in his claim, raises no privity whatever between his testator and the United States. The State of Virginia, not the United States, is the party suable on that contract; and for this reason alone this claim might have been, and this appeal should be, dismissed. (Act of February 24, 1855, section 1, vol. 10, p. 612.)

V. Apparently perceiving that the claim was open to this defense, the able counsel whose name is attached to this petition attempted to place this claim on other ground. Conceding, as it were, that the claim is not valid at law, the petition sets forth a case for the interposition of a court of equity. The allegation is of property held in trust by the United States for the satisfaction of these bounty warrants, and of a violation of this trust by the trustee; and the claim is not for a judgment in a sum of money, such only as a court of common law is authorized to give, but generally for "such relief" as the United States "in equity and good conscience" are bound to render to him.

Here, then, is a distinct claim that the Court of Claims has an equity jurisdiction, for over the subject of trusts courts of equity have exclusive jurisdiction. (Story's Eq. Jur., section 960, vol. 2, p. 151.) This court being created by statute, its equitable jurisdiction must be sought for in the acts of Congress defining its powers; and there no such jurisdiction can be found. It is not authorized to give judgment except upon the basis of an act of Congress, a regulation of an executive department, or a contract, which terms do not include a case of trust arising out of a Virginia bounty land warrant.

VI. But this is not the only defense to be made to this claim when considered as a bill in equity. The United States deny the allegation of fact with which the bill concludes, namely, the allegation of trust violated, which is the essential allegation of the petition: whatever trust was imposed upon the United States by the cession of the Northwest Territory has been amply fulfilled.

May 30, 1830 (IV, 424), Congress authorized land scrip covering in all 310,000 acres, to be issued for the benefit of persons holding Virginia military bounty land warrants.

By an act approved July 13, 1832 (IV, 578), a further quantity of 300,000 acres was set apart for the same purpose.

By the act of August 31, 1852 (X, 143), the United States made ample provision for the satisfaction of all Virginia military land warrants issued prior to March 1, 1852, and then outstanding.

This legislation constitutes an ample fulfillment of all the duties which the United States, as trustee, under the cession of the Northwest Territory assumed toward the holders of these warrants. As toward these beneficiaries even, the United States is without fault.

VII. But in the trust created by this cession, the holders of these warrants were not the only beneficiaries whose interests the United States were bound to cherish. The act of cession provided that all the lands within the ceded territory, not reserved for, or appropriated to, other purposes, or disposed of in bounties to officers and soldiers, should be considered as a common fund for the use and benefit of the United States, and "be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever." (Laws of United States, Bioren and Duane, vol. 1, p. 474.)

The course of legislation just referred to, while justifiable toward the beneficiaries under the first trust, was absolutely necessary to the proper fulfillment of the duties imposed by this second trust. (Jackson *vs.* Clark, 1 Pet., 634.)

VIII. There is open in defense still another consideration to which the attention of this honorable court is respectfully solicited; it is this: a Virginia military bounty land warrant imposed no legal obligation upon the United States which any officer of the latter was by law required or authorized to fulfill. Of itself, and without further legislation by Congress, it gave no legal right against the United States. This being stated as premise, the point thereupon made in defense, is, that the absence of such necessary legislation furnishes no

ground for the maintenance of a suit in the Court of Claims. This tribunal was not established to exercise the legislative functions of Congress. It can only *find* and *consider;* it cannot *make* claims lawful. Not a contract which *ought to be*, but one which *is*, authorized by law, must be the basis of its judgment. If there is no law of the United States providing for the satisfaction of a military bounty land warrant, then the remedy of the unsatisfied holder devolves not upon the Court of Claims created by Congress, but upon Congress itself.

E. R. HOAR,
Attorney General of the United States.